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**TITLE 405 OFFICE OF THE SECRETARY OF
FAMILY AND SOCIAL SERVICES**

Proposed Rule
LSA Document #03-134

DIGEST

Amends 405 IAC 2-8-1 to eliminate the exclusion of a life insurance policy and annuity from the definition of “estate” for Medicaid estate recovery purposes. Amends 405 IAC 2-8-1.1 to reduce the estate recovery exemption for jointly-owned real property from \$125,000 to \$75,000. Amends 405 IAC 2-10-3 to eliminate the prohibition on filing a lien when an individual who provided care to the Medicaid recipient resides in the home. Amends 405 IAC 2-10-7 to provide that a lien expires unless the Office of Medicaid Policy and Planning commences a foreclosure action within two years of the recipient’s death. Adds 405 IAC 2-10-7.1 specifying procedures for voiding the lien. Amends 405 IAC 2-10-8 to eliminate the prohibition on enforcement when a recipient is survived by a parent. Amends 405 IAC 2-10-9 to provide that a lien is subordinate to the security interest of a financial institution that loans money to be used as operating capital for a farm, business, or income-producing property. Adds 405 IAC 2-10-11 to specify that property that is disregarded for eligibility purposes in connection with the purchase and use of a qualified long term care insurance policy is exempt from lien placement and enforcement. Repeals 405 IAC 2-10-10 to eliminate the exemption of \$125,000 on property subject to a lien. Effective 30 days after filing with the secretary of state.

405 IAC 2-8-1	405 IAC 2-10-8
405 IAC 2-8-1.1	405 IAC 2-10-9
405 IAC 2-10-3	405 IAC 2-10-10
405 IAC 2-10-7	405 IAC 2-10-11
405 IAC 2-10-7.1	

SECTION 1. 405 IAC 2-8-1, AS AMENDED AT 26 IR 731, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-8-1 Claims against estate for benefits paid

Authority: IC 12-8-6-5; IC 12-13-5-3; IC 12-15-1-10

Affected: IC 12-15-9; IC 12-15-39.6-10

Sec. 1. (a) Upon the death of a Medicaid recipient fifty-five (55) years of age or older, the office of Medicaid policy and planning (office) shall seek recovery from the recipient’s estate for medical assistance paid on behalf of the recipient after the recipient became fifty-five (55) years of age or older. Recovery shall be made for benefits provided prior to October 1, 1993, only if the recipient was sixty-five (65) years of age or older at the time the benefits were provided.

(b) As used in this section, “estate”, with respect to a deceased recipient, shall include all of the following:

(1) All real and personal property and other assets included within the recipient’s estate as defined for purposes of state probate law.

(2) Any interest in real property owned by the individual at the time of death that was conveyed to the individual’s survivor through joint tenancy with right of survivorship, if the joint tenancy was created after June 30, 2002. ~~and~~

(3) Any real or personal property conveyed through a nonprobate transfer. As used in this section, “nonprobate transfer” means a valid transfer, effective at death, by a transferor who immediately before death had the power, acting alone, to prevent transfer of the property by revocation or withdrawal and:

(A) use the property for the benefit of the transferor; or

(B) apply the property to discharge claims against the transferor’s probate estate.

The term does not include a transfer of a survivorship interest in a tenancy by the entireties real estate ~~transfer of a life insurance policy or annuity~~, or payment of the death proceeds of a life insurance policy. ~~or annuity~~.

(c) If the recipient is survived by a spouse, recovery shall be made after the death of the surviving spouse. Only those assets that are included in the recipient's estate as defined in subsection (b) are subject to recovery.

(d) If the recipient is survived by a child, no recovery shall be made while the child is either:

- (1) under twenty-one (21) years of age; or
- (2) blind or disabled as defined in 42 U.S.C. 1382c.

(e) A claim may not be enforced against the following assets:

- (1) Personal effects, ornaments, or keepsakes of the deceased.
- (2) Assets of an individual who purchases a long term care insurance policy that are disregarded pursuant to IC 12-15-39.6-10.
- (3) Nonprobate assets that were determined exempt or unavailable for purposes of the decedent's Medicaid eligibility prior to May 1, 2002.
- (4) Assets that the decedent transferred through a nonprobate transfer prior to May 1, 2002.

(f) The office may waive the application of this section in cases of undue hardship pursuant to section 2 of this rule. (*Office of the Secretary of Family and Social Services; 405 IAC 2-8-1; filed May 1, 1995, 10:45 a.m.: 18 IR 2226; filed Feb 15, 1996, 11:20 a.m.: 19 IR 1563; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; filed Oct 10, 2002, 10:55 a.m.: 26 IR 731*)

SECTION 2. 405 IAC 2-8-1.1, AS ADDED AT 26 IR 732, SECTION 2, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-8-1.1 Claims against estate; exemption

Authority: IC 12-8-6-5; IC 12-13-5-3; IC 12-15-1-10

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 1.1. (a) This section applies only to real property owned by the individual at the time of death that was conveyed to the individual's survivor through joint tenancy with right of survivorship.

(b) The office may enforce its claim against property described in subsection (a) only to the extent that the value of the recipient's combined total interest in all real property described in subsection (a) subject to the claim exceeds ~~one hundred twenty-five thousand~~ **seventy-five** thousand dollars (~~(\$125,000)~~; **(\$75,000)**).

(c) This section expires January 1, 2008. (*Office of the Secretary of Family and Social Services; 405 IAC 2-8-1.1; filed Oct 10, 2002, 10:55 a.m.: 26 IR 732*)

SECTION 3. 405 IAC 2-10-3, AS ADDED AT 26 IR 1547, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-10-3 Criteria for instituting a TEFRA lien

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 3. (a) When the office in accordance with 42 U.S.C. 1396p determines that a Medicaid recipient who resides in a medical institution cannot reasonably be expected to be discharged and return home, the office may attach a lien on the Medicaid recipient's real property subject to the provisions of this rule and IC 12-15-8.5.

(b) The office may not obtain a lien on the recipient's home if any of the following people lawfully reside in the home of the institutionalized recipient:

- (1) The recipient's spouse.
- (2) The recipient's child who is less than twenty-one (21) years of age, blind, or disabled as defined in 42 U.S.C. 1382c.
- (3) The recipient's sibling who:
 - (A) was residing in the recipient's home for a period of at least one (1) year immediately before the recipient's institutionalization; and
 - (B) has an ownership interest in the home.
- (4) The recipient's parent.
- (5) ~~An individual, other than a paid caregiver, who:~~

(A) was continuously residing in the recipient's home for a period of at least two (2) years immediately prior to the date of the recipient's institutionalization; and
(B) establishes to the satisfaction of the office that the person provided care to the recipient enabling the recipient to reside in his or her home, delaying institutionalization.

(Office of the Secretary of Family and Social Services; 405 IAC 2-10-3; filed Dec 13, 2002, 4:00 p.m.: 26 IR 1547)

SECTION 4. 405 IAC 2-10-7, AS ADDED AT 26 IR 1548, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-10-7 Effect of filing; duration

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 7. (a) From the date on which the notice of lien is recorded in the office of the county recorder, the notice of lien:

(1) constitutes due notice of a lien against the recipient or recipient's estate for any amount then recoverable and any amounts that become recoverable under this article; and

(2) gives a specific lien in favor of the office on the Medicaid recipient's interest in the real property.

(b) The lien continues from the date of filing until the lien:

(1) is satisfied;

(2) is released; or

(3) expires.

The lien automatically expires unless the office commences a foreclosure action not later than ~~nine (9) months~~ **two (2) years** after the Medicaid recipient's death. *(Office of the Secretary of Family and Social Services; 405 IAC 2-10-7; filed Dec 13, 2002, 4:00 p.m.: 26 IR 1548)*

SECTION 5. 405 IAC 2-10-7.1 IS ADDED TO READ AS FOLLOWS:

405 IAC 2-10-7.1 Notice to office to file an action to foreclose the lien

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 7.1. (a) This section applies after the death of the Medicaid recipient whose property is subject to a lien under this rule or after the sale or other transfer of property that is subject to the lien.

(b) A lien under this rule is void if both of the following occur:

(1) The owner of property subject to a lien under this rule or any person or corporation having an interest in the property, including a mortgagee or a lienholder, provides written notice to the office to file an action to foreclose the lien.

(2) The office fails to file an action to foreclose the lien in the county where the property is located not later than thirty (30) days after receiving the notice. However, this section does not prevent the claim from being collected as other claims are collected by law.

(c) A person who gives notice under subsection (a)(1) by registered or certified mail to the office at the address given in the recorded statement and notice of intention to hold a lien may file an affidavit of service of the notice to file an action to foreclose the lien with the recorder of the county in which the property is located. The affidavit must state the following:

(1) The facts of the notice.

(2) That more than thirty (30) days have passed since the notice was received by the office.

(3) That no action for foreclosure of the lien is pending.

(4) That no unsatisfied judgment has been rendered on the lien.

(d) The recorder shall:

(1) record the affidavit of service in the miscellaneous record book of the recorder's office; and

(2) certify on the face of the record any lien that is fully released.

When the recorder records the affidavit and certifies the record under this subsection, the real estate described in the lien is released from the lien. *(Office of the Secretary of Family and Social Services; 405 IAC 2-10-7.1)*

SECTION 6. 405 IAC 2-10-8, AS ADDED AT 26 IR 1548, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-10-8 Enforcement; foreclosure

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 8. (a) The office may not enforce a lien on the recipient's home under this rule if the following individuals are lawfully residing in the recipient's home and have resided there on a continuous basis since the recipient's date of admission to the medical institution:

(1) The recipient's child of any age who:

(A) resided in the recipient's home for at least twenty-four (24) months before the recipient was institutionalized; and

(B) establishes to the satisfaction of the office that he or she provided care to the recipient that enabled the recipient to reside in his or her home delaying institutionalization.

(2) The recipient's sibling who has resided in the recipient's home for a period of at least one (1) year immediately before the date of the recipient's admission to the medical institution.

(b) The office may not enforce a lien on the real property of the recipient under this rule as long as the recipient is survived by any of the following:

(1) ~~The~~ recipient's spouse.

(2) ~~The~~ recipient's child who is less than twenty-one (21) years of age, blind, or disabled as defined in this rule.

(3) ~~The recipient's parent.~~

(c) If there is no condition present in subsection (a) or (b), the office, or its designee, may bring a proceeding in foreclosure on the lien or to make arbitration of the amount due on the lien as follows:

(1) If the real property or recipient's interest is sold **or otherwise transferred** during the lifetime of the recipient.

(2) Upon the death of the recipient.

(Office of the Secretary of Family and Social Services; 405 IAC 2-10-8; filed Dec 13, 2002, 4:00 p.m.: 26 IR 1548)

SECTION 7. 405 IAC 2-10-9, AS ADDED AT 26 IR 1549, SECTION 1, IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-10-9 Release; subordination

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-9

Sec. 9. (a) The office shall release a lien obtained under this rule within ten (10) business days after the county office of family and children receives notice that the recipient is no longer institutionalized and is living in his or her home.

(b) A lien obtained under this rule is subordinate to the ~~subsequent~~ security interest of a financial institution as defined in IC 12-15-8.5 that loans money to the recipient provided that the recipient is able to establish to the satisfaction of the office that the funds were used for any of the following purposes:

(1) ~~The payment of taxes, insurance, maintenance, and repairs in order to preserve and maintain the recipient's real property.~~

(2) ~~operating capital for the operation of the recipient's farm, the recipient's business, or the recipient's real property that is income-producing.~~

(3) ~~The payment of medical, dental, or optical expenses incurred by:~~

(A) ~~the recipient;~~

(B) ~~the recipient's spouse;~~

(C) ~~the recipient's dependent parent; or~~

(D) ~~a child less than twenty-one (21) years of age or who is blind or disabled.~~

(4) ~~The reasonable costs and expenses for the support, maintenance, comfort, and education of the recipient's spouse, a dependent parent, or a child who is less than twenty-one (21) years of age or who is blind or disabled.~~

(c) If the real property subject to the lien is sold, the office shall release its lien at the closing, and the lien shall attach to the net proceeds of the sale. *(Office of the Secretary of Family and Social Services; 405 IAC 2-10-9; filed Dec 13, 2002, 4:00 p.m.: 26 IR 1549)*

SECTION 8. 405 IAC 2-10-11 IS ADDED TO READ AS FOLLOWS:

405 IAC 2-10-11 Exemption

Authority: IC 12-8-6-5; IC 12-15-1-10; IC 12-15-8.5

Affected: IC 12-15-3-6; IC 12-15-39.6-10

Sec. 11. Real property that is disregarded for eligibility purposes in connection with the purchase and use of a qualified long term care insurance policy pursuant to IC 12-15-39.6-10 is exempt from lien placement and enforcement. (*Office of the Secretary of Family and Social Services; 405 IAC 2-10-11*)

SECTION 9. 405 IAC 2-10-10 IS REPEALED.

Notice of Public Hearing

Under IC 4-22-2-24, notice is hereby given that on August 27, 2003 at 10:00 a.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Rooms 4 and 5, Indianapolis, Indiana the Office of the Secretary of Family and Social Services will hold a public hearing on proposed new rules to reduce the Medicaid estate recovery exemption for jointly-owned real property from \$125,000 to \$75,000, to repeal the exemption of \$125,000 on property subject to a lien, and to make other changes concerning Medicaid estate recovery and liens. Copies of these rules are now on file at the Indiana Government Center-South, 402 West Washington Street, Room W451 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

John Hamilton
Secretary
Office of the Secretary of Family and Social Services